

**Perbadanan Kemajuan Negeri Selangor v Projek Lebuhraya
Usahasama Bhd & Ors**

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22C-20-09 OF 2014
SEE MEE CHUN J
22 JUNE 2017

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Civil Procedure — Parties — Joinder of parties — Plaintiff sued defendants for collapse of interchange constructed by third defendant — Plaintiff withdrew its claim against second defendant — First defendant applied to add second defendant as co-defendant — Whether absence of second defendant as party to plaintiff's claim would preclude court's ability to apportion liability as against second defendant — Whether first defendant would be prejudiced if application was not allowed — Whether necessary for second defendant be added as co-defendant — Rules of Court 2012 O 15 r 6(2)

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The plaintiff had appointed Dr YG Tan Jurutera Perunding Sdn Bhd ('the second defendant') as the main infrastructure consultant for a construction project ('the project'). Part of the project envisaged the building of a Cloverleaf interchange ('the interchange') over the North-South Expressway Central Link ('the highway'). The highway was operated and maintained by Projek Lebuhraya Usahasama Bhd ('the first defendant'). The plaintiff also appointed B&I Builder Sdn Bhd ('the third defendant') as the main contractor to carry out the construction and building works for the interchange. A section of the interchange collapsed on 28 February 2013 which led to the filing of the present suit by the plaintiff. On 9 January 2017, there was a settlement between the plaintiff and the second defendant and the plaintiff withdrew its claim against the second defendant. Consequently, the court struck out the plaintiff's claim against the second defendant with no order as to costs. Dissatisfied with the decision, the first defendant filed the present application ('encl 162') to add the second defendant as co-defendant. In support of encl 162, the first defendant submitted that the second defendant was a joint tortfeasor whose role and/or action had a direct bearing and/or was the direct cause or one of the causes for the collapse of the interchange. The first defendant further submitted that the absence of the second defendant as a party to the plaintiff's claim would preclude the court's ability to apportion liability as against the second defendant. The first defendant also stated that it would be severely prejudiced if the second defendant was not a co-defendant as its preparation was always on the premises the second defendant as co-defendant.

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Held, allowing encl 162:

- A (1) In apportionment, if the court were to find that any tortfeasor responsible for the collapse of the interchange, this would not be between the first defendant and the second defendant as the latter was not a co-defendant in the suit by the plaintiff. This was as opposed to third party proceedings which was a separate proceeding (see para 13).
- B (2) Based on the principles of a joinder application as laid down in O 15 r 6(2) of the Rules of Court 2012 and the case of *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143, the prime consideration has to be that all necessary and proper parties should be before the court at the same time to enable the effectual and complete detention and adjudication of all questions and issues between the parties. The issue before the court was the collapse of the interchange and who caused it. It was thus necessary that the second defendant be added as a co-defendant as the pleadings of the first defendant were that the second defendant's role and/or action had a direct bearing and/or was the direct cause of the collapse of the interchange. Further, the second defendant could be added as a co-defendant against the plaintiff's wish as long as the application to add was limited to the pleadings, which had been shown to be the case (see paras 16 & 18).
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- E (3) It would be the first defendant that would be more prejudiced if its application was not allowed as its case was always premised on the second defendant being a co-defendant as compared to the second defendant who was already a party to the counterclaim of the first defendant (see para 19).

F **[Bahasa Malaysia summary]**

- Plaintif telah melantik Dr YG Tan Jurutera Perunding Sdn Bhd ('defendan kedua') sebagai pakar perunding infrastruktur utama bagi projek pembinaan ('projek'). Sebahagian projek membayangkan pembinaan persimpangan Cloverleaf ('persimpangan tersebut') di Lebuhraya Utara-Selatan Lingkaran Tengah ('lebuhraya tersebut'). Lebuhraya tersebut dikendalikan dan diselenggarakan oleh Projek Lebuhraya Usahasama Bhd ('defendan pertama').
- G Plaintif juga melantik B&I Builder Sdn Bhd ('defendan ketiga') sebagai kontraktor utama untuk melaksanakan kerja-kerja pembinaan dan bangunan untuk persimpangan tersebut. Sebahagian persimpangan tersebut runtuh pada 28 Februari 2013 yang membawa kepada pemfailan tindakan ini oleh plaintiff. Pada 9 Januari 2017, terdapat penyelesaian di antara plaintiff dan defendan kedua dan plaintiff menarik balik tuntutan terhadap defendan kedua. Akibatnya, mahkamah membatalkan tuntutan plaintiff terhadap defendan kedua tanpa perintah terhadap kos. Tidak puas hati dengan keputusan tersebut, defendan pertama memfailkan permohonan ini ('lampiran 162') untuk memasukkan defendan kedua sebagai defendan bersama. Dalam menyokong lampiran 162, defendan pertama berhujah bahawa defendan kedua adalah pelaku tort bersama yang mana peranan dan/atau tindakan
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mempunyai kaitan langsung dan/atau penyebab langsung atau salah satu penyebab keruntuhan persimpangan tersebut. Defendan pertama selanjutnya berhujah bahawa ketidakhadiran defendan kedua sebagai pihak kepada tuntutan plaintif akan menghalang keupayaan mahkamah untuk membahagikan liabiliti terhadap defendan kedua. Defendan pertama juga menyatakan bahawa ia akan sangat menjejaskan jika defendan kedua adalah bukan defendan bersama kerana penyediaannya sebelum ini berdasarkan defendan kedua sebagai defendan bersama.

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Diputuskan, membenarkan lampiran 162:

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- (1) Dalam pembahagian, jika mahkamah mendapati bahawa mana-mana pelaku tort bertanggungjawab atas keruntuhan penyimpangan tersebut, ini bukan di antara defendan pertama dan defendan kedua kerana defendan kedua bukan defendan bersama di dalam tindakan oleh plaintif. Ini adalah bertentangan prosiding pihak ketiga yang mana adalah prosiding berasingan (lihat perenggan 13).

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- (2) Berdasarkan prinsip permohonan percantumana seperti ditetapkan di dalam A 15 k 6(2) Kaedah-Kaedah Mahkamah 2012 dan kes *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143, pertimbangan utama adalah bahawa kesemua pihak yang perlu dan betul sepatutnya di hadapan mahkamah pada masa yang sama untuk membolehkan penahanan yang berkesan dan lengkap dan penghakiman kesemua persoalan dan isu di antara pihak-pihak. Isu di hadapan mahkamah adalah keruntuhan penyimpangan tersebut dan siapa yang menyebabkannya. Oleh itu adalah perlu bahawa defendan kedua dimasukkan sebagai defendan bersama kerana pliding defendan pertama adalah bahawa peranan dan/atau tindakan defendan kedua mempunyai kaitan langsung dan/atau sebab langsung keruntuhan penyimpangan tersebut. Selanjutnya, defendan kedua boleh dimasukkan sebagai defendan bersama terhadap keinginan plaintif asalkan permohonan untuk memasukkan adalah terhad kepada pliding, yang mana telah terbukti berlaku (lihat perenggan 16 & 18).

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- (3) Ia adalah defendan pertama yang akan lebih terjejas jika permohonannya tidak dibenarkan kerana kesnya selalu berdasarkan ke atas defendan kedua sebagai defendan bersama dibandingkan kepada defendan kedua yang telah menjadi pihak kepada tuntutan balas defendan pertama (lihat perenggan 19).]

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Notes

For cases on joinder of parties, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6994–7038.

A Cases referred to

Ang Soong Seng & Anor v Noraini bte Doralik & Anor [2003] 5 MLJ 456, HC (refd)

K Siladass (claiming as a law firm partner practicing under the name K Siladass & Partners) v CIMB Bank Bhd [2015] 4 MLJ 818; [2015] 6 CLJ 726, CA (refd)

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Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor [2011] 5 MLJ 219, CA (refd)

Saminathan s/o Ramasamy v Rukuman bin Marjuki & Anor [1997] MLJU 168; [1998] 5 CLJ 718, HC (refd)

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Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143, SC (refd)

Legislation referred to

Rules of Court 2012 O 15 r 6(2)

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Sia Siew Mun (Alvin Oh with her) (Sia Siew Mun & Co) for the first defendant. Wong Hok Mun (Azim, Tunku Farik & Wong) for the proposed joinder parties.

See Mee Chun J:

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[1] Encl 162 is the application by Projek Lebuhraya Usahasama Bhd ('PLUS') as D1 in this suit filed by Perbadanan Kemajuan Negeri Selangor ('PKNS') to add Dr YG Tan Jurutera Perunding Sdn Bhd ('YG Tan') as co-defendant. The alternative prayer for leave to issue third party notice was dropped.

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[2] PKNS initially filed this suit against PLUS, YG Tan and B&I Builder Sdn Bhd ('B&I'). PLUS in turn filed a counterclaim against PKNS, YG Tan and B&I. At the material time PKNS was the developer for a development

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known as 'Cadangan Pembangunan Bercampur di Taman Sains Selangor 2 Bukit Raja Daerah Sepang Selangor' ('development'). Within this development was the construction of 'Pembinaan Persimpangan Bertingkat Jenis Cloverleaf di KMP 2.2 Lebuhraya Sambungan Putrajaya dan Kerja-Kerja yang berkaitan ke Taman Sains Selangor 2 Bukit Raja Mukim Dengkil Daerah Sepang Selangor' ('project').

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[3] PKNS appointed YG Tan as the main infrastructure consultant and/or consultant engineer for the development. Part of the project envisaged the building of a cloverleaf interchange ('interchange') over the North-South Expressway Central Link ('highway'). The highway was operated and maintained by PLUS. PKNS also appointed B&I as the main contractor to carry out the construction and building works for the interchange. On 28 February 2013 a section of the interchange collapsed leading to this suit by PKNS.

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[4] On 9 January 2017 there was a settlement between PKNS and YG Tan and PKNS withdrew its claim against YG Tan. The court then struck out PKNS's claim against YG Tan with no liberty and no costs. A

[5] This thus prompted PLUS to file its encl 162 to add YG Tan as co-defendant. B

AFFIDAVIT IN SUPPORT ENCL 163

[6] In its affidavit in support in encl 163 PLUS sets out the reasons why YG Tan ought to be joined as co-defendant namely: C

- (a) collapse of the interchange was caused by YG Tan's negligence as set out in para 4.1.1–4.1.4. Hence it was a joint tortfeasor whose role and/or action had a direct bearing and/or was the direct cause or one of the causes for the collapse of the interchange; D
- (b) would enable all matters in dispute in PKNS action to be effectually and completely determined and adjudicated upon; and
- (c) absence of YG Tan as a party to PKNS claim would preclude the court's ability to apportion liability as against YG Tan. E

[7] Para 4.4 of affidavit in support sets out the negligence of YG Tan:

It is also PLUS's defence that the collapse of the Interchange was caused by, inter alia, the negligence of YG Tan in that — F

- 4.4.1 A duty of care (and hence, a duty to indemnify) arises on the part of YG Tan to ensure that due care and/or skills is exercised in the preparation of the design of the interchange and/or the supervision of the construction works of the interchange such that PLUS and/or its highway, running directly below the interchange, does not suffer damage and/or loss; G
- 4.4.2 There were several material departures from the as-built drawings and such material departure was within YG Tan's duty to supervise and ensure that the same did not occur; H
- 4.4.3 YG Tan failed to address, adequately and/or at all, the extremely poor subsoil conditions on which the Interchange was constructed; and
- 4.4.4 YG Tan's design of the Interchange failed to provide for the extremely poor subsoil conditions which led to the Interchange's gradual settlement and the eventual collapse thereof. I

A [8] PLUS also stated YG Tan will not be prejudiced as it already is a party to its counterclaim (para 7). PLUS would however be severely prejudiced if YG Tan was not a co-defendant as its preparation was always on the premise YG Tan was a co-defendant.

B AFFIDAVIT IN REPLY ENCL 164

[9] In its affidavit in reply in encl 164 YG Tan raised the following:

- C (a) res judicata and estoppel arising from PKNS withdrawing its claim against YG Tan and court striking out the claim;
- (b) PKNS cannot be forced to pursue against YG Tan; and
- (c) as PLUS has been sued jointly and severally by PKNS, the liability of YG Tan will be no defence to PLUS and will not mitigate the damage recoverable.

D (Para 5(b)–(d)).

In its submission, there was no objection to being added as third party.

E ANALYSIS AND FINDING

[10] Order 15 r 6(2) of the Rules of Court 2012 provides as follows:

F 6(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either of its own motion or on application —

- (a) ...
- (b) order any of the following persons to be added as a party, namely —
- G (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
- (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine as between him and the party as well as between the parties to the cause or matter.

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I [11] In *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 the Supreme Court laid down the following general principles for a joinder application:

- (1) The principle of overriding importance is that all necessary and proper parties, but no others, should be before the court at the same time to enable the effectual and

- complete determination and adjudication to be made by the court of all questions and issues between the parties which arise for decision. A
- (2) ...
- The joinder of parties is permitted as of right in a wide area of circumstances or otherwise with the leave of the court. B
- ...
- (4) Generally, in common law and chancery matters, a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons who he has no wish to sue. C
- (5) Nevertheless, a person who is not a party may be added as a defendant over the objections of the plaintiff on his own intervention or upon the application of the defendant or in some cases by the court of its own motion.
- (6) But, a defendant against whom no relief is sought by the plaintiff will generally not be added against the wishes of the latter. A third party notice is in such a case usually the proper procedure to adopt though such a defendant can be added in a proper case. D
- [12] It was firstly contended by PLUS that YG Tan had to be added as co-defendant as the court will not be in a position to apportion liability to a person who is not before the court. *Ang Soong Seng & Anor v Noraini bte Doralik & Anor* [2003] 5 MLJ 456 was cited in support. Counsel for YG Tan supported this proposition and further stated it was trite law a non party cannot be apportioned liability. It however took the position third party proceedings would suffice and not joinder of party. *K Siladass (claiming as a law firm partner practicing under the name K Siladass & Partners) v CIMB Bank Bhd* [2015] 4 MLJ 818; [2015] 6 CLJ 726 was referred to where at p 736 it was stated: E
- ... Third party proceedings are the adjectival or procedural 'vehicle', as it were, that enables a defendant in a suit brought against it by a plaintiff, to seek contribution from a third party who has contributed to, or caused such liability to arise as between the plaintiff and the defendant. The substantive provisions allowing for such a contribution or third party claim can arise both in contract and in tort ... The substantive provisions in law in relation to contribution by joint tortfeasors is to be found in s 10(1)(c) of the Civil Law Act 1956. It provides as follows: F
- ... where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued, have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. G
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- A It was thus contended ‘contribution’ gives the court power to apportion and therefore leave to issue third party notice ought to be filed.
- B [13] In this regard the court agreed with counsel for PLUS that in apportionment if the court were to find the any tortfeasor responsible for the collapse of the interchange, this will not be between PLUS and YG Tan as YG Tan was not a co-defendant in the suit by PKNS. This is as opposed to third party proceedings which is a separate proceedings.
- C [14] With regard to res judicata and estoppel, that is between PKNS and YG Tan. *Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor* [2011] 5 MLJ 219 relied on by YG Tan applied to a situation where in that case in relation to the first suit between appellant and respondent there was a consent judgment and the first suit was withdrawn. It was stated there was res judicata and estoppel. It was thus held that to allow appellant to file the second suit based on the same facts or substantially the same facts was unjust and grossly prejudicial to respondent. In this instant application there is no res judicata or estoppel as between PLUS and YG Tan.
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- E [15] On the liability of YG Tan being no defence to PLUS as it has been sued jointly and severally by PKNS, that was not a ground advanced to add YG Tan as co-defendant.
- F [16] Referring to the principles of a joinder application as laid down in O 15 r 6(2) and *Tajjul*, the prime consideration has to be that all necessary and proper parties should be before the court at the same time to enable the effectual and complete detention and adjudication of all questions and issues between the parties. The issue before the court is the collapse of the interchange and who caused it. It is thus necessary that YG Tan be added as a co-defendant as the pleadings of PLUS were that YG Tan’s role and/or action had a direct bearing and/or was the direct cause of the collapse of the interchange. Refer to para 4 of affidavit in support in encl 163 which has been set out in para 7 above.
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- H [17] As to the principle that a defendant cannot be added against PKNS’s wish, this must be considered in the light of *Saminathan s/o Ramasamy v Rukuman bin Marjuki & Anor* [1997] MLJU 168; [1998] 5 CLJ 718 where it was stated at pp 726–727:
- I It is therefore clear that when the application is made by the defendant to add a co-defendant against the wishes of the plaintiff the application must be limited to matters arising in the pleadings, that is to say, the statement of claim must disclose a case against the proposed co-defendant. It was for this reason that the Supreme Court ruled in *Tajjul Ariffin* that a plaintiff cannot be compelled to amend his pleadings to accommodate an intended co-defendant.

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Notwithstanding what I have said the court has a general discretion to add a co-defendant against the wishes of the plaintiff ...

[18] This therefore means YG Tan can be added as a co-defendant against PKNS's wish as long as the application to add is limited to the pleadings, which has been shown to be the case.

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[19] On prejudice to parties, it would be PLUS that would be more prejudiced if its application was not allowed as its case was always premised on YG Tan being a co-defendant as compared to YG Tan who was already a party to the counterclaim of PLUS.

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CONCLUSION

[20] For the above reasons PLUS's application to add YG Tan as co-defendant was allowed.

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Enclosure 162 allowed.

Reported by Dzulqarnain Ab Fatar

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